AURA INDAH JAYA SDN BHD v. OCBC BANK (MALAYSIA) BHD & ANOTHER APPLICATION

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[SUIT NO: WA-22NCC-361-08-2020]
14 FEBRUARY 2021

BANKING: *Banker and customer – Relationship – Termination – Customer's conduct of bank accounts caused inconvenience to bank – Bank terminated relationship with customer and closed customer's accounts – Customer accepted refund of balance without protest – Whether closure of bank accounts lawful – Whether bank entitled to close customer's bank accounts – Whether bank required to give reasons for closure – Whether customer estopped from questioning validity of closure*

BANKING: *Banker and customer – Documents – Construction of – Customer's conduct of bank accounts caused inconvenience to bank – Bank terminated relationship with customer and closed customer's accounts – Whether documents signed by customer entitled bank to close bank accounts – Whether bank required to give reasons for closure*

CIVIL PROCEDURE: *Striking out – Application for – Banking – Customer commenced action against bank for closing customer's bank accounts – Whether there were triable issues – Whether matter could be decided without going to trial – Whether action bore merits – Whether frivolous, scandalous and/or vexatious – Whether abuse of court's process – Whether action ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(b), (c) and/or (d)*

The plaintiff had signed application forms and opened three current accounts ('three bank accounts') and one fixed deposit account ('FD account') ('bank accounts') with the defendant. By signing the application forms, the plaintiff agreed to be bound by: (i) the Business Access-i Terms and Conditions ('BA T&C') which governed the operations of the three bank accounts; and (ii) the Accounts and Services – Main Terms and Conditions ('General T&C') which governed the operations of both the three bank accounts and the FD account. The defendant later terminated the relationship with the plaintiff as the latter's conduct of its bank accounts was said to have caused much inconvenience to the former, namely, (i) the plaintiff did not, and refused to, utilise the internet banking facility to conduct its business transactions but, instead, chose to do over-the-counter transactions; (ii) the defendant incurred substantial time and costs in seeking confirmations from the plaintiff's sole authorised contact person ('Arun') for each transaction performed over-the-counter; and (iii) it was extremely difficult to contact Arun as he was always overseas, and despite phone call appointments with the defendant's officers, Arun was still uncontactable. The defendant

proceeded to close the plaintiff's bank accounts and the balance refunded to the plaintiff, by way of cashier's order, was encashed by the latter *sans* objection or protest. This prompted the plaintiff to initiate the present suit against the defendant (i) for a declaration that the closure of the three bank accounts was unlawful; (ii) for an order to re-open the three bank accounts; and (iii) for general damages. The defendant applied to strike out the plaintiff's claim, pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the court, on the grounds that (i) in signing the application forms, the plaintiff had accepted, and was bound by, the BA T&C and the General T&C; (ii) the defendant was entitled to close the three bank accounts under cl. 4.3 of the BA T&C and cls. 12.2 and 12.3 of the General T&C and the FD account under cls. 12.2 and 12.3 of the General T&C; (iii) having encashed the cashier's order without any objection or protest, the plaintiff was estopped by its conduct from disputing the validity of the defendant's closure of the bank accounts; and (iv) the plaintiff's claim against the defendant was devoid of merits, frivolous, scandalous and/or vexatious and an abuse of the court's process ('encl. 8'). Objecting to encl. 8, the plaintiff argued that, *inter alia*, cl. 12.3 of the General T&C was to be read subject to cl. 12.2 which set out four specific events which would entitle the defendant to terminate the bank accounts. The plaintiff filed for the determination of questions of law and/or construction of documents ('encl. 10').

Held (allowing encl. 8 with costs; dismissing encl. 10 with costs):

(1) This was not a complicated or technical case that could only be properly proved by oral evidence. The plaintiff's only cause of action was predicated on a breach of contract. That issue could be resolved by a construction of the BA T&C and the General T&C. A trial would not throw further light on the matter as it could be decided, once and for all, without going to trial. Justice demanded that the action be dismissed as it could not succeed; neither should the defendant be put through the costly process of a full trial. (paras 56 & 57)

(2) By signing the application forms, the plaintiff agreed, and was bound by, the BA T&C and the General T&C. Upon a proper construction of cl. 4.3 of the BA T&C and cl. 12.3 of the General T&C, and giving these clauses their natural and ordinary meaning, the defendant was entitled to close the three bank accounts and was not required to give any reason for doing so. It was axiomatic that the duty of the court was to give effect to the intention of the parties, as expressed. Furthermore, there is no duty, under general law, to give reasons when terminating a contract unless the contract itself stipulates the grounds for a valid termination. (paras 28, 36 & 37)

(3) Clauses 12.2 and 12.3 of the General T&C were separate provisions for termination. Clause 12.2 provided four reasons or circumstances in which the bank may close the bank accounts while under cl. 12.3, both the plaintiff and the defendant have a right to close the three bank accounts by giving notice to the other without assigning any reason for such closure. To attribute the meaning as the plaintiff wished, to cl. 12.3, would offend the basic principle of law that does not require the court to imply words into the document or attribute to the parties an intention which they never had. (para 38)

(4) Estoppel applied against the plaintiff from bringing this action to dispute the validity of the closure of the three bank accounts. After the bank accounts were closed, the balance was refunded to the plaintiff by way of a cashier's order, which was encashed by the plaintiff without any objection or protest. The plaintiff had abused the court's process by bringing the present action. Furthermore, with the action struck out, there was no more live issue for encl. 10; encl. 10 was rendered academic. (paras 47, 52 & 60)

Case(s) referred to:

Addis v. Gramophone Co Ltd [1909] AC 488 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Bennett v. Bennett (1952) 1 All ER 413 ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

CC Ng & Brothers Sdn Bhd v. Government of the State of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45 FC ***(refd)***

CCA Holdings Ltd v. Palm Resort Bhd [1998] 4 CLJ 440 HC ***(refd)***

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC ***(refd)***

Doe v. Bank of Am Corp [2017] US Dist LEXIS 127749 ***(refd)***

Dr Meer Ahmad Mydin Meera v. Public Services Commission Malaysia & Ors [2010] 5 CLJ 675 HC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2007] 6 CLJ 741 CA ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Gabriel Peter & Partners (suing as a firm) v. Wee Chang Jin [1998] 1 SLR 374 ***(refd)***

Haron Mundir v. Singapore Amateur Athletic Association [1992] 1 CLJ 284; [1992] 4 CLJ (Rep) 404 HC ***(refd)***

Hunter v. Chief Constable of Midlands Police [1982] AC 529 ***(refd)***

Investors' Compensation Scheme Ltd v. West Bromwich Building Society [1998] WLR 896 ***(refd)***

Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
N Joachimson (a Firm Name) v. Swiss Bank Corporation [1921] All ER Rep 92 ***(refd)***
National Commercial Bank Jamaica Ltd v. Olint Corpn Ltd [2009] 1 WLR 1405 ***(refd)***
Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***
Prosperity Limited v. Lloyds Bank Ltd (1923) 3 LDAB 287 ***(refd)***
Protasco Bhd v. Pt Anglo Slavic Utama & Ors [2020] 1 LNS 997 HC ***(refd)***
R v. Secretary of State for the Home Dept; ex parte Salem [1999] 2 All ER 42 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Subramaniam v. Retnam [1965] 1 LNS 169 HC ***(refd)***
Sun Life Assurance Co of Canada v. Jervis [1944] 1 All ER 469 ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Kerajaan Negeri Selangor [2013] 1 LNS 1301 CA ***(refd)***
Tan Sri Musa Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Appeal [2020] 3 CLJ 42 CA ***(refd)***
Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***
Wong Yee Boon v. Gainvest Builders (M) Sdn Bhd [2020] 2 CLJ 727 FC ***(refd)***
Yap Chee Hean v. Public Investment Bank Bhd [2014] 2 CLJ 1036 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(e), 29
Rules of Court 2012, O. 14A r. 1(5), O. 18 r. 19(1)(b), (c), (d)
Rules of the High Court 1980, O. 18 r. 19(1)

Other source(s) referred to:
Paget's Law of Banking, 15th edn, p 127, Chapter 7

For the plaintiff - Adrian Ong & Naveen Sri Kantha; M/s Thomas Philip
For the defendant - Lau Kee Sern & Cynthia Liaw Tze Feng; M/s Kee Sern, Siu & Huey

Reported by Najib Tamby

JUDGMENT

Liza Chan Sow Keng JC:

[1] There are two applications before the court – enclosure ("encl.") 8 made by the defendant pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012 ("ROC 2012") and/or under the inherent jurisdiction of the court to strike out the plaintiff's claim and encl. 10 made by the plaintiff pursuant to O. 14A of ROC 2012 for the determination of questions of law and/or construction of documents.

[2] On 22 December 2020, I heard both enclosures. I allowed encl. 8 for striking out with costs and dismissed encl. 10 with costs.

[3] As the matters were related, it is convenient to deal with both enclosures in one judgment. This judgment as such contains the full reasons in amplification of the grounds delivered on 22 December 2020 in allowing encl. 8 and for dismissal of encl. 10.

Background

[4] The background facts are largely undisputed.

[5] The plaintiff signed application forms and opened three current accounts ("the impugned bank accounts") and one fixed deposit account ("FD account") with the defendant. In this judgment, the impugned accounts and the FD account are collectively referred as the bank accounts.

[6] In signing the application forms, the plaintiff had agreed to be bound by the following terms and conditions:

(i) Business access-i terms and conditions ("the business access-i T&C"); and

(ii) Accounts and services – main terms and conditions ("general T&C").

[7] The operation of the impugned bank accounts were governed by the business access-i T&C and the general T&C whilst the FD account was governed by only the general T&C.

[8] Clause 4.3 of the business access-i T&C provided that:

> The Bank reserves the right at its absolute discretion to withdraw, cancel, suspend, extend, or terminate BA/BA-i at any time in whole or in part, or to vary, delete or add to any of the terms and conditions herein at any time with prior notice, by way of posting on the Bank's website at (www.ocbc.com.my), or in any other method deemed appropriate by the Bank. Each customer agrees to access the Bank's website stated herein at regular time intervals to view the terms and conditions herein and to ensure that the customer is kept up-to-date with any changes or variations to these terms and conditions. The customers shall not be entitled to claim for any compensation against the Bank for any and all loss and damage howsoever suffered or incurred by the customers, whether as a direct or indirect result of any withdrawal, cancellation, suspension, extension or termination of BA/BA-i or any variation, deletion or addition to any of the terms and condition herein.

[9] Clause 12 of the general T&C reads:

> 12. Closing Of Accounts & Termination Of The Services
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> …
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> 12.2 The Bank may close any of the Account or terminate the Services:
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> (a) If the Bank believes or suspects that the Account is used for money laundering or other fraudulent or illegal schemes or in breach of any guidelines or rules issued by Bank Negara Malaysia or any other authority;

A (b) If the Bank in good faith doubts the authority or authenticity of any instructions;

(c) If there are changes in the name, constitution, composition, or dissolution of the Customer due to retirement, resignation, incapacity, bankruptcy, winding-up, insolvency or otherwise; or

B (d) If there is a dispute in relation to any of the Accounts.

12.3 The Customer may terminate the Account or suspend or terminate the utilisation of any of the Services by giving written notice to the Bank. For a corporate Customer, the notice period to terminate the Account or utilisation of any of the Services shall be at least 30 days. The Bank may C also close the Account or suspend or terminate any or all of the Services by giving notice to the Customer. Upon closure of the Account, all unused cheque book/leaf shall be returned to the Bank.

[10] The defendant states that the plaintiff's conduct of its bank accounts had caused much inconvenience to the defendant:

D (i) The plaintiff did not utilise the internet banking facility for the purpose of its business transactions. Instead, they were done over-the-counter where cheques were issued for domestic transactions and telegraphic transfer forms were submitted for overseas transactions;

E (ii) The plaintiff's conduct of the bank accounts had resulted in the bank incurring substantial time and costs in seeking and obtaining confirmations from the plaintiff's sole authorised contact person, namely Mr Arun Prem Bhojwani ("Mr Arun") for each transaction performed over-the-counter;

F (iii) It was extremely difficult to contact Mr Arun as he was always overseas within different time zone. The defendant's officers were compelled to make phone call appointments with Mr Arun and he was often uncontactable even after appointments had been made as borne out by the emails exchanged between the defendant's officers in exh. "OCBC-5". G

(iv) It was against this backdrop that the defendant had requested the plaintiff to utilise its internet banking facility and/or add another authorised contact person for the purpose of confirming the plaintiff's banking transactions. The plaintiff had refused to do so but continued its business H transactions in the same manner which had resulted in much difficulties and hardship to the defendant in maintaining the impugned bank accounts.

[11] By email dated 3 April 2020, the defendant informed the plaintiff that the defendant's management has decided to terminate the banking I relationship between the plaintiff and the defendant.

[12] The plaintiff's solicitors then by letter dated 20 April 2020 requested for the following from the defendant:

(i) a copy of the applicable terms and conditions of the impugned bank accounts; and

(ii) the reason(s) giving rise to the defendant's decision to close the impugned bank accounts.

[13] On 23 April 2020, the defendant by email provided the plaintiff with the link containing the terms and conditions ('T&C') governing the impugned bank accounts.

[14] During a telephone conference on 20 May 2020, the plaintiff's solicitors were informed by the defendant's officers that:

(i) that the closure of the impugned bank accounts was premised on a "commercial decision" by the defendant; and

(ii) that the defendant was entitled to terminate the impugned bank accounts pursuant to cl. 12.3 of the general T&C.

[15] Premised on the telephone conference, the plaintiff's solicitors, by letter dated 22 May 2020 informed the defendant that the reason given for the closure of the impugned bank accounts is inconsistent with the T&C.

[16] By letter dated 2 June 2020, the defendant informed the plaintiff's solicitors that:

(i) That the defendant's decision to close the impugned bank accounts remained unchanged; and

(ii) That pursuant to cl. 12.3 of the general T&C, the defendant may close the impugned bank accounts upon giving notice of the same to the plaintiff.

[17] On the same day, 2 June 2020, the defendant issued an official notice to the plaintiff to close the bank accounts.

[18] On 16 June 2020, the bank accounts were closed with the balance therein refunded to the plaintiff by way of a cashier's order which was encashed by the plaintiff without any objection or protest thereto.

[19] On 5 August 2020, the plaintiff commenced the present suit against the defendant for a declaration that the closure of the impugned bank accounts was unlawful and for orders that the defendant do reopen the impugned bank accounts; pay general damages to be assessed to the plaintiff, costs and interest.

A **Enclosure 8**

[20] The defendant's application to strike out the plaintiff's claim is based on the following broad grounds:

(i) The defendant was entitled to close the bank accounts – in signing the
B application forms, the plaintiff had accepted and is bound by the business access-i T&C and the general T&C which entitled the defendant to:

(a) close the impugned accounts under:

C (1) clause 4.3 of the business access-i T&C without providing any reason therefor;

(2) clause 12.2 of the general T&C for the reasons and circumstances specified therein; and

(3) clause 12.3 of the general T&C by giving prior notice but
D without providing any reason therefor.

(b) close the FD account under cls. 12.2 and 12.3 of the general T&C

(ii) The plaintiff is not entitled to dispute and/or is in any event estopped by its conduct from disputing the validity of the defendant's closure of
E the bank accounts – the cashier's order to refund the balance in the bank accounts to the plaintiff was encashed by the plaintiff without any objection or protest thereto;

(iii) The plaintiff is not entitled to claim any loss of reputation, creditworthiness and/or goodwill allegedly caused by the purported
F breach of contract by the defendant (if any which is denied). Such loss (if any) is in any event too remote and is not recoverable in fact and in law against the defendant;

(iv) The plaintiff is not entitled to any of the reliefs sought herein as it has failed to come to this court with clean hands; and
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(v) The plaintiff's claim herein against the defendant is devoid of merits, frivolous, scandalous and/or vexatious and an abuse of the process of the court.

[21] In supporting his submissions, learned counsel for the defendant relied
H on amongst others:

(i) *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309;

(ii) *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133; [1975]
I 2 MLJ 1;

(iii) *Syarikat Bekalan Air Selangor Sdn Bhd v. Kerajaan Negeri Selangor* [2013] 1 LNS 1301; [2014] 4 MLJ 147;

(iv) *Yap Chee Hean v. Public Investment Bank Bhd* [2014] 2 CLJ 1036; [2014] 8 MLJ 494 at 513;

(v) *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464;

(vi) *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597;

(vii) *Investors' Compensation Scheme Ltd v. West Bromwich Building Society* [1998] WLR 896;

(viii) *Dr Meer Ahmad Mydin Meera v. Public Services Commission Malaysia & Ors* [2010] 5 CLJ 675; [2009] MLJU 1455;

(ix) *Doe v. Bank of Am Corp* [2017] US Dist LEXIS 127749;

(x) *Addis v. Gramophone Co Ltd* [1909] AC 488;

(xi) *Haron Mundir v. Singapore Amateur Athletic Association* [1992] 1 CLJ 284; [1992] 4 CLJ (Rep) 404 at 416;

(xii) *CCA Holdings Ltd v. Palm Resort Bhd* [1998] 4 CLJ 440; [1998] 4 MLJ 143 at 150; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741; [2008] 2 MLJ 812 at 834;

(xiii) *Paget's Law of Banking*, 15th edition;

(xiv) *Prosperity Limited v. Lloyds Bank Ltd* (1923) 3 LDAB 287;

(xv) *N Joachimson (a Firm Name) v. Swiss Bank Corporation* [1921] All ER Rep 92; and

(xvi) *National Commercial Bank Jamaica Ltd v. Olint Corpn Ltd* [2009] 1 WLR 1405.

The Plaintiff's Case

[22] In this suit and in resisting the striking out, the plaintiff did not dispute the closure of the FD account but argued in essence that the closure of the impugned accounts is in breach of the general T&C and is therefore unlawful. The plaintiff's counsel contended that:

(i) the termination clause as contained in cl. 4.3 of the business access-i T&C has been varied by cl. 12 of the general T&C since cl. 12 deals with the circumstances in which the defendant is entitled to terminate the impugned bank accounts; any interpretation to the contrary would import an element of uncertainty in that there would be two inconsistent provisions contained in two separate documents which govern the defendant's entitlement to terminate the impugned bank accounts;

(ii) clause 12.2 of the general T&C is the applicable clause which sets out the grounds entitling the defendant to terminate the impugned bank accounts – in this regard:

(a) clause 12.2 sets out four specific events which would entitle the defendant to terminate the impugned bank accounts;

(b) in contrast, cl. 12.3 states, amongst others, that the defendant is entitled to terminate the impugned bank accounts "by giving notice to the customer";

(c) if clauses 12.2 and 12.3 are inconsistent with one another, the plaintiff submits that cl. 12.2 (as the preceding clause in the general T&C), must prevail;

(d) If cl. 12.3 can be read in isolation as posited by the defendant, cl. 12.2 will be rendered redundant; as such, the defendant's entitlement to terminate the impugned bank accounts as set out in cl. 12.3 must be qualified and/or restricted to the specific grounds stipulated in cl. 12.2;

(iii) the defendant's termination of the impugned bank accounts premised on a "commercial decision" was unlawful and runs foul of the general T&C as cl. 12.2 of the general T&C sets out four instances in which the defendant is entitled to terminate the T&C. The plaintiff postulated that "commercial decision" does not fall within the specific grounds that permit the defendant to terminate the impugned bank accounts; and

(iv) the portion of cl. 4.3 which seeks to preclude the plaintiff from claiming any form of damages against the defendant arising from the termination of the impugned bank accounts offends ss. 24(e) and/or 29 of the Contracts Act 1950 ("CA 1950") and is unlawful/void (para 51 encl. 22) citing in support the Federal Court decision in *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1; [2019] 2 MLJ 1;

(v) the threshold for striking out has not been met as the issues involve complex issues of law and/or construction to be determined by the court.

Findings And Decision On Enclosure 8

[23] As the application to strike out is made under O. 18 r. 19(1)(b), (c) and/or (d) ROC 2012, I propose to set out O. 18 r. 19 for convenience:

19. Striking out pleadings and endorsements (O. 18 r. 19)

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, A

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

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(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[24] In an application under this provision of the ROC 2012, I am guided by a catenation of cases on the subject. The court will only strike out a claim in a plain and obvious case or that the claim is obviously unsustainable – C *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 where the Supreme Court clearly held at p. 11 (CLJ); pp. 43 and 44 (MLJ):

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 D are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule … and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' …
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> This court as well as the court below is not concerned at this state with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the F case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson and Wenlock v. Moloney & Ors).*

[25] In *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309, Siti Norma JCA G (later, CJM) explained the approach when dealing with an application under O. 18 r. 19(1) of the Rules of the High Court 1980:

> The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the H exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v, Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v, Essex Area Health Authority & I Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890).

When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 MLJ 400) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

(emphasis added)

[26] In *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425; [2019] 1 MLJ 59, the Federal Court in a judgment delivered by Ramly Ali FCJ, distilled the applicable principles as follows:

[16] The principle for striking out of pleadings pursuant to O 18 r 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC); *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).

[17] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, *inter alia*, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[18] The Court of Appeal in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage: A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial, (see: *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 (FC)).

[19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[27] In *Protasco Bhd v. Pt Anglo Slavic Utama & Ors* [2020] 1 LNS 997; [2020] MLJU 1413, I stated:

[21] In exercising utmost caution so as not to deprive the plaintiff from its day in court, this court in considering the 'bound to fail' or 'obviously unsustainable' or that the fact that the case is 'weak and not likely to succeed at the trial is no ground for the pleading to be struck out' tests is entitled where the application does not concern limb (a) of O. 18 r 19(1), to examine not just the statement of claim but the affidavit evidence critically as was done by the Privy Council in *Tractors Malaysia v. Tio Chee Hing* [1975] 2 MLJ 1.

[22] I hasten to add that the decision in *Tractors Malaysia* to examine the affidavit evidence critically was followed by the former Supreme Court in the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 in a judgment dated 29 July 1993 delivered by Peh Swee Chin, SCJ sitting with Abdul Hamid Omar, LP and Mohamed Dzaiddin, SCJ. In the *Bandar Builder* case (*supra*), a judgment dated 20 days earlier on 9 July 1993 delivered by Mohamed Dzaiddin, SCJ sitting with Abdul Hamid Omar, LP and Eusoff Chin, SCJ, the former Supreme Court, however, held that the court should not embark on a minute protracted examination of the evidence.

[23] In my respectful view, where there is manifestly conflict in decisions of the same apex court, the principles in *Young v. Bristol Aeroplane Co* Ltd [1944] KB 718 offers guidance, that the latter decision should prevail suffice to say that it is trite that the court should not examine the evidence in such a way as to amount to conduct a trial on the conflicting material affidavit evidence. I am also mindful of the pronouncement of the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements

A contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

[28] It is trite in the law of contract that a person who is a party to a written contract is bound by the terms of the contract whether or not he understands B the language in which it is documented, in the absence of fraud or misrepresentation (see *Subramaniam v. Retnam* [1965] 1 LNS 169; [1966] 1 MLJ 172). In signing the application forms, the plaintiff has agreed and is bound by the business access-i T&C and the general T&C.

[29] As I see it, the crux of the dispute between the parties here is whether C the defendant is entitled to terminate the banking relationship with the plaintiff which led to the closure of the impugned bank accounts. This in substance revolved around the construction of the business access-i T&C and the general T&C which governed the operation of the impugned bank accounts. It will be thus convenient to say a few words about the D interpretation of contracts.

[30] When looking at a contract, the court needs to:

(i) consider the whole contract;

(ii) give effect to every clause; and

E

(iii) bring each clause into harmony with the other clauses.

see – *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 and *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689.

F **[31]** These principles were held by the Federal Court in *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689 at pp. 823-824 (CLJ); p. 700 (MLJ):

[34] … it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the G true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ Rep 37 and *Mulpha* H *Pacific Sdn Bhd v. Paramount Corp Bhd* [2003] 4 MLJ 357). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* (1973) 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed I so as to render them all harmonious one with another.

[35] Professor McMeel in *The Construction of Contracts (Interpretation, Implication and Rectification)* (2nd Ed, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:

> Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.

[36] As stated by Lewison in *The Interpretation of Contracts* (5th Ed) at para 7.02 that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. In *Chamber Colliery Co Ltd v. Twyerould* (1893) [1915] 1 Ch 268n (which was cited by Lewison), Lord Watson said: I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[32] The Federal Court in a judgment delivered by Azahar Mohamed FCJ (CJM later) in the case of *Wong Yee Boon v. Gainvest Builders (M) Sdn Bhd* [2020] 2 CLJ 727; [2020] 3 MLJ 571 had reiterated the principles in the *Lucy Wong Nyuk King* case.

[33] It is also trite that when interpreting the meaning of the words used in a contract they should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy – *The Interpretation of Contracts* by *Kim Lewinson; Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 2 MLJ 256 CA.

[34] It is also a basic rule in the law of contract that what have been agreed by contracting parties should be given effect to. The Federal Court in *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45 said as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole agreement.

[35] The construction of the business access-i T&C and the general T&C in this case is a question of law to be determined by the court. It is not for the parties or their counsel to say what the documents say or mean – *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259;

[2005] 4 MLJ 101 CA. *Silver Concept* (*supra*) was referred to by the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 where Jeffrey Tan FCJ delivering the judgment of the court authoritatively said:

> [156] It must be more than settled that the construction of a document is a question of law. In *Munusamy v. Public Services Commission* [1964] 1 MLJ 239, where on the construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, Thomson LJ said 'That question of construction is a question of law …'. In *Citicorp Investment Bank (Singapore) Ltd v. Wee Ah Kee* [1997] 2 SLR 759, Yong Pung How CJ said 'we must approach the construction of the document, which is a question of law, untrammelled by any concession as to the meaning of the agreement that might have been given by the court below'. 'It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd And Another v. Threadgold* [1974] 1 WLR 1514 (HL)' (*Bintulu Development Authority v. Pilecon Engineering Bhd* [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). In *Bahamas International Trust Co Ltd And Another v. Threadgold*, Lord Diplock said 'that the construction of a written document is a question of law', which was followed in *Tan Suan Heoh v. Lim Teck Ming & Ors* [1987] 2 MLJ 466, *NVJ Menon v. The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, *Padiberas Nasional Bhd v. Kontena Nasional Bhd* [2010] 3 MLJ 134, and *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 and *Tun Dr Mahathir bin Mohamad & Ors v. Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1). In *Desa Teck Guan Koko Sdn Bhd v. Sykt Hap FohBh Hing (suing as a firm)* [1994] 2 MLJ 246, Ian Chin J opined that …'

[36] With the foregoing principles in mind, and having considered the affidavits and the parties' submissions, I am of the considered view and is inclined to accept the defendant's arguments that upon a proper construction of cl. 4.3 of the business access-i T&C and cl. 12.3 of the general T&C, the defendant is entitled to close the impugned bank accounts without giving any reason in the termination notice. In my opinion, in the clear, unambiguous and unmistakable language that cls. 12.3 and 4.3 are cast, and given their natural and ordinary meaning, the defendant is not required to give any reason for closing the accounts and it is axiomatic that the duty of this court to give effect to the intention of the parties as expressed. It was superfluous for the defendant to state in the telephone conference that the termination is a "commercial decision".

[37] That there is no duty under general law to give reasons when terminating a contract unless the contract itself stipulates the grounds for valid termination was made clear by the Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464:

> [104] … *Insofar as the appellant contends that the respondent, when terminating the contract, has a duty to give reasons in accordance with general law, that contention is false and without authority.* Nonetheless, *such a duty may be imposed by proper construction of the contract*. Factors that lend towards establishing such a duty are, *inter alia*, where grounds for valid termination of the agreement are particularised in the contract and where the contract purports to give the party in breach an opportunity to remedy its unsatisfactory performance, such that without knowledge of the particular alleged breaches, no meaningful effort to remedy them can be taken. In the context of the present case, the notice of termination is bad in law.
>
> (emphasis added)

[38] I reject the plaintiff's arguments that cl. 12.3 of the general T&C is to be read subject to cl. 12.2. In my considered view, cl. 12.2 and cl. 12.3 are separate provisions for termination. Under cl. 12.2 of the general T&C, for any of the four reasons or circumstances stated therein, the bank may close the bank accounts, and under cl. 12.3, both the plaintiff and the defendant have a right to close the impugned bank accounts by giving notice to the other without assigning any reason for such closure. To attribute the meaning which the plaintiff wishes to cl. 12.3 will in my utmost respectful view, offend a basic principle of law that does not require the court to imply words into the document or attribute to the parties an intention which they never had. With great respect to the plaintiff's counsel, this court cannot apply Humpty Dumpty's logic when he told Alice:

> 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'
>
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'
>
> - Humpty Dumpty/Through the Looking Glass by Lewis Carroll

[39] In my further view, to imply that cl. 12.3 of the general T&C is to be read subject to cl. 12.2 as suggested by the plaintiff, will in fact contradict and militate against the express provisions of cl. 12.3. I will not re-write cl. 12.3 and am satisfied that in its specific wordings, the parties would not have responded "Oh, of course!" (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151) if the officious bystander had asked them at the time the general T&C was entered into whether cl. 12.3 is to be read subject to cl. 12.2.

[40] I also agree with the defendant's counsel's assertion that the plaintiff's argument that cl. 12.3 is to be read subject to cl. 12.2 if accepted, will lead to an absurdity where the plaintiff's right to close the bank accounts must likewise be limited to and may only be exercised based on the circumstances specified in cl. 12.2. I can only add that the plaintiff cannot be countenanced to take a position that will seem in the light of day to be purely self-serving.

[41] My finding that the defendant is entitled to terminate the banking relationship with the plaintiff and close the impugned bank accounts is fortified by *Paget's Law of Banking*, 15th edn, at p. 127, in Chapter 7 on relationship of banker and customer where the learned author said:

> The relationship may terminate:
>
> (i) by agreement between the parties;
>
> (ii) **by unilateral act, as where the customer or the banker gives notice to terminate**; or
>
> (iii) by death of the customer.
>
> Termination by agreement does not require comment. *As to termination by notice, where it is the banker who gives notice to terminate an account in credit, such notice must be adequate to enable the customer to make other banking arrangement, save where the arrangement provides otherwise. Conversely, save if the contract says otherwise, the bank need not have or give a good reason to terminate.*
>
> (emphasis added)

[42] In urging upon this court that the defendant has a general legal right and contractual right under cl. 4.3 of the business access-i T&C and cl. 12.3 of the general T&C to close any of the impugned bank accounts by giving a notice of termination without having or giving any reason, counsel for the defendant cited three cases which I subscribe to:

(i) In *Prosperity Limited v. Lloyds Bank Ltd* (1923) 3 LDAB 287 which held:

> ... there was no doubt that *a banker had a right to close at any time an account which was in debit, but in the ease of an account which was in credit he must give a reasonable notice, which would vary according to circumstances*; and there might be special arrangements between the banker and the customer as to what notice would be required. In the absence of any special arrangement, he had to consider in the present case whether a month's notice was sufficient.
>
> (emphasis added)

(ii) *N Joachimson (a Firm Name) v. Swiss Bank Corporation* [1921] All ER Rep 92 where the court took a similar position and held:

> ... I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary

course of business for two or three days, **it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice**. (emphasis added)

(iii) *National Commercial Bank Jamaica Ltd v. Olint Corpn Ltd* [2009] 1 WLR 1405 at 1406 where the court held:

> The chief issue in this appeal, as formulated by Panton P in the Court of Appeal, is *whether a bank, "by merely giving reasonable notice", can lawfully close an account that is not in debit, where there is no evidence of that account being operated unlawfully. Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice*: *Paget's Law of Banking*, 13th ed (2007), p 153. (emphasis added)

[43] Bearing in mind that cl. 12.3 of the general T&C does not state the length of requisite notice, in the instant case however, the defendant had as early as 3 April 2020 by email, given notice of closure of the impugned bank accounts; enquired if the plaintiff needed more time to make alternative banking arrangements, and eventually issued to the plaintiff the notice of closure of bank accounts dated 2 June 2020. The accounts were then closed on 16 June 2020. I hold that there is sufficient notice and the defendant is not in breach of any provision of the general T&C or the business access-i T&C in closing the bank accounts.

[44] Notwithstanding that the defendant in its letter dated 2 June 2020 to the plaintiff's solicitors (p. 97 of encl. 9) stated that the defendant has a right to close the bank accounts under cl. 12.3 of the general T&C, but yet the defendant's notice of termination dated the same day of 2 June 2020 to the plaintiff stated that the bank accounts would be closed "in accordance with our agreed terms and conditions" (p. 98 of encl. 9), in my view, the basis for closing the accounts do not make one whit of difference as it is not in dispute that the general T&C and the business access-i T&C both govern the operation of the impugned accounts.

Estoppel/Approbation And Reprobation

[45] As stated earlier, the operation of the FD account was governed by the general T&C which affords the defendant the right to close the FD account under any of the circumstances in cl. 12.2 or under 12.3 without assigning any reason. I have earlier held that cl. 12.2 and cl. 12.3 are separate provisions. The defendant's rights under cl. 12.3 to close the FD account is independent of the rights under cl. 12.2 of the general T&C.

[46] The FD account was closed together with the impugned bank accounts. However, the plaintiff in this action is not disputing the closure of the FD account but only the impugned bank accounts. The plaintiff cannot be countenanced to approbate and reprobate on the defendant's rights to close the impugned bank accounts under cl. 12.3 of the general T&C.

[47] That is not all. I am of the view that estoppel also applies against the plaintiff from bringing this action to dispute the validity of the closure of the impugned bank accounts. After the bank accounts were closed on 16 June 2020, the balance was refunded to the plaintiff by way of a cashier's order which was encashed by the plaintiff without any objection or protest thereto.

Is Clause 4.3 Of The Business Access-i T&C Void?

[48] The plaintiff in its submission at para. 51 encl. 22 posited that the portion of cl. 4.3 which seeks to preclude the plaintiff from claiming any form of damages against the defendant arising from the termination of the impugned bank accounts offends ss. 24(e) and/or 29 of the Contracts Act 1950 and is unlawful/void.

[49] This issue was however not pleaded by the plaintiff. It is trite law that the court is not entitled to decide a suit on a matter not pleaded as it offends the fundamental rules of natural justice. In any case, given what was said above, that the defendant was not in breach of the terms and conditions governing the operation and/or closure of the bank accounts, the question of damages for breach does not arise at all and there is no need for me to comment on it. Even if I am wrong, that portion of cl. 4.3 is in my view, severable from the rest of cl. 4.3, and does not render the whole cl. 4.3 void.

[50] In *Bennett v. Bennett* (1952) 1 All ER 413, 421 Denning LJ said:

> If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.

Conclusion

[51] Having therefore given careful consideration to the history leading to the closure of the bank accounts, I find on the facts of this case that:

(i) the plaintiff is bound by cl. 12.3 of the general T&C and cl. 4.3 of the business access-i T&C;

(ii) clause 12.3 of the general T&C and cl. 4.3 of the business access-i T&C are general provisions which do not contradict nor are in conflict with the specific grounds of termination under cl. 12.2 of the general T&C;

(iii) In its plain language, cl. 12.3 of the general T&C does not state that the bank accounts can only be closed subject to the four circumstances set out in cl. 12.2;

(iv) properly construed, both cl. 4.3 of the business access-i T&C and cl. 12.3 of the general T&C do not require the bank to give any reasons in closing the bank accounts. Hence, there is no basis in fact and in law for the plaintiff to dispute the bank's right to close the bank accounts;

(v) There is no provision in the general T&C and the business access-i T&C requiring the defendant's notice of termination to be given in a certain format or with a requisite length of notice. The plaintiff was in fact accorded a period of more than two months since April 2020 before the bank accounts were eventually closed on 16 June 2020.

[52] Given the plaintiff's non dispute of the closure of the FD account and the encashment of the cashier's order of the balance in the bank accounts without any protest, I am of the view the plaintiff is estopped by conduct from disputing the validity of the closure of the impugned bank accounts and in bringing this action, has abused the court process.

[53] Two notable cases in 1998 often cited by our courts explained what is "abuse of process of the court":

(i) *Gabriel Peter & Partners (suing as a firm) v. Wee Chang Jin* [1998] 1 SLR 374 at p. 384:

> The term 'abuse of the process of the court', in O. 18 rule 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. *The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose* ... if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. (emphasis added)

(ii) In the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425, Gopal Sri Ram JCA (later FCJ) had this to say in regard to the doctrine of abuse of process:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[54] The categories of abuse are not closed. When abuse is revealed, the court has a duty, not a discretion, to dismiss the action: *Hunter v. Chief Constable of Midlands Police* [1982] AC 529, per Lord Diplock at 536D. Following Lord Diplock's pronouncement, the inevitable consequence in the instant action must be a dismissal of the plaintiff's claim.

[55] I have also considered that a striking out order is a draconian order and it will not be lightly made. In this context, I am reminded of the observation of Seah FJ in the Federal Court case of *CC Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347:

> The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

[56] In my judgment, this is not a complicated or technical case that can only be properly proved by oral evidence. The plaintiff's only cause of action is predicated on breach of contract (see para. 27 of the statement of claim). That issue can be resolved by a construction of the general T&C and cl. 4.3 of the business access-i T&C. Properly construed, the defendant's right to close the impugned bank accounts is unarguable. A trial will not throw any further light on the matter as it can be decided once and for all without going to trial.

[57] On balance, I am of the view that justice demands that this action should be dismissed. The instant suit cannot succeed. Neither in my respectful view should the defendant be put through the costly process of a full trial in the circumstances as obtained here.

[58] For the reasons I have given above, I think I can be absolved from blame if I did not delve in detail and address here each and every single argument and case authority submitted by the parties as I find it strictly unnecessary to do so in arriving at a decision. I state this formally for the avoidance of doubt.

[59] Accordingly, encl. 8 is allowed under O. 18 r. 19(1)(b), (c) and (d) ROC 2012 with costs of RM6,000 subject to allocator.

Enclosure 10

[60] With the action struck out, I find that there is no more live issue for encl. 10. In other words, encl. 10 was rendered academic.

[61] It is a fundamental feature of our judicial system that the courts only decide live issues but not those which have become hypothetical or only of academic importance. In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113, the Federal Court dealt with the circumstances in which a pending matter may be rendered academic in the following terms:

> [7] In dealing with the circumstances in which an appeal will be rendered academic and thereby not appealable, Viscount Simon LC said in *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 at pp. 470-471:
>
> > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties. ... *I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.*
>
> (emphasis added)

[62] *Sun Life Assurance Co of Canada v. Jervis* cited in the above Federal Court judgment concerns private rights.

[63] In determining whether a pending matter which has since become academic may still be heard, Lord of Hadley in *R v. Secretary of State for the Home Dept; ex parte Salem* [1999] 2 All ER 42 at p. 47 explained:

> My Lords, I accept, as both counsels agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*. The decisions in the *Sun Life* case and *Ainsbury v. Millington* (and the reference to the latter in r 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> *The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so*, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.
>
> (emphasis added)

[64] Lord Slynn of Hadley's speech was cited approvingly by the Federal Court in *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129; [2018] MLJU 1288 and *Tan Sri Musa Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Appeal* [2020] 3 CLJ 42; [2020] 3 MLJ 46.

[65] Although the above cases were decided in the context of whether an appeal has become academic, I am of the view that the principles distilled there as to whether there is in existence a matter in actual controversy between the parties which will affect them in some way in my view are applicable to the facts of the present application in encl. 10.

[66] The application in encl. 10 which was rendered academic is not one concerning public law rights. It is settled law that a court will not act in vain. It was not necessary to hear encl. 10. In any case, some of the questions posed overlap with the questions to be answered in determining encl. 8.

[67] It must also be emphasised that the plaintiff's O. 14A application in encl. 10 does not handcuff the powers of the court to strike out the plaintiff's claim herein if the circumstances such as obtained here, warrant it. In this regard, O. 14A r. 1(5) ROC 2012 expressly states:

> Nothing in this Order shall limit the powers of the court under Order 18, rule 19 or any other provisions of these Rules

[68] Enclosure 10 is as such dismissed with costs of RM1,000 subject to allocator. In determining costs for encl. 10, I have taken into account that common submissions were filed for both encls. 8 and 10.